

**PATENT**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicants:	Brian Edward BROOKER, et al.	Docket No.:	M02B148
Serial No.	10/525,189	Examiner:	Kelly Jo BEKKER
371 Date:	November 7, 2005	Group Art Unit:	1781
Title:	MANUFACTURE OF ICE CREAM	Conf. No.:	3687

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March 10, 2011

(date)

**APPELLANTS' REPLY BRIEF UNDER 37 C.F.R. § 41.41**

Dear Sir:

This a Reply Brief submitted in response to the Examiner's Answer mailed January 19, 2011, which was in response to Appellants' Brief under 37 C.F.R. § 41.37 appealing to the Board of Patent Appeals and Interferences (the "Board") from the final rejection set forth in the Office Action mailed July 1, 2010. The Notice of Appeal was submitted electronically via EFS-Web by Appellants on October 1, 2010. The present appeal is of claims 23-39 and 41 of the present application.

**The Status of Claims** begins on page 2.

**The Grounds of Rejection to be Reviewed on Appeal** begins on page 3.

**The Argument** begins on page 4.

### **Status of Claims**

Claims 1-22 were canceled and new claims 23-43 were added by a preliminary amendment filed contemporaneously with the application on February 22, 2005. Claims 42-43 were canceled, without prejudice, in Appellants' Response filed on November 17, 2008. Claim 40 was canceled, without prejudice, in Appellants' Response filed on December 18, 2009. Claims 23-39 and 41 are currently under final rejection and constitute the claims on appeal.

**Grounds for Rejection to be Reviewed on Appeal**

A. The 35 U.S.C. § 103(a) rejection of claims 23-33, 37, 39 and 41 as unpatentable over EP 0 147 483 to Delany, et al., in view of U.S. Patent Application Publication No. 2001/0038872 A1 to Brooker.

B. The 35 U.S.C. § 103(a) rejection of claims 34-36 and 38 as unpatentable over EP 0 147 483 to Delany, et al. in view of U.S. Patent Application Publication No. 2001/0038872 A1 to Brooker, further in view of U.S. Patent No. 4,012,533 to Jonas.

C. The 35 U.S.C. § 112, second paragraph rejection of claim 41 as being indefinite for failing to particularly point out and distinctly claim the subject matter which Appellants regard as the invention.

## **Argument**

Appellants have provided detailed arguments in Appellants' Brief under 37 C.F.R. § 41.37 filed November 2, 2010. The present arguments herein specifically respond to the allegations made in the Examiner's Answer mailed January 19, 2011. It is noted that many of the Examiner's arguments made in the Response to Argument section of the Examiner's Answer (pages 10-18) have been made in prior Office Actions and have been addressed in Appellants' Brief. Appellants' purpose herein is to concisely respond to only those arguments which have not been previously presented by the Examiner.

### **A. Claims 23-33, 37, 39 and 41**

Appellants maintain that there is no motivation to alter the process steps in Delany. In response, the Examiner alleges that "to switch the order of performing process steps, i.e. the order of the addition of the ingredients in the final mixture, would be obvious absent any clear and convincing evidence and/or arguments to the contrary (MPEP 2144.04 [R-1])." The Examiner then alleges that "to precrystallize the fat prior to or after blending with the other food ingredients would not provide for new or unexpected results as both form precrystallized particles of fat prior to processing steps . . .; the switched order is simply a difference in the order of addition of the ingredients prior to processing." (Examiner's Answer, page 12.)

Appellants respectfully submit that the Examiner continues to ignore the present specification when interpreting the term "precrySTALLISED", and has further ignored Appellant's previous arguments in this regard, found at pages 10-11 of Appellants' Brief. The presently claimed subject matter is not merely "a difference in the order of addition of the ingredients prior to processing." The present claims are clearly directed to blending previously crystallized fat with other ice cream precursors.

The present application discloses that the edible fat may be crystallized prior to mixing with other ice cream ingredients by a process including forming the edible fat into fine particles in a molten state and contacting the fine particles with a cryogen. *See* for example and at least claim 24. Thus, the fat is precrystallized prior to commencing the method of claim 1 of the present application. Consequently, the typical ice cream manufacturing steps of homogenization and ageing are eliminated from the claimed process. For this reason, it is not merely a difference

in the order of addition of the ingredients prior to processing that differentiates the claimed invention, but also that the claimed subject matter of the present application does not require the processing steps occurring in the process of Delany. Simply put, the method of claim 1 results in a more efficient ice cream manufacturing process.

The Examiner continues to allege that "Appellant's [sic] argument [that certain of the process steps of Delany are critical] is not convincing as no criticality is shown in the references regarding the fat as pre-crystallized prior to or after blending with other ingredients." This allegation could not be further from the truth, as is clear from Appellants' previous arguments.

The Examiner's position on this point again shows that the Examiner is not interpreting the term "precrySTALLISED" correctly, as discussed in detail previously and above, because the Examiner again suggests that precrySTALLISATION may occur after blending with other ice cream ingredients. As disclosed and defined in the present application, "precrySTALLISED" means that the fat crystals are formed prior to blending or mixing with the other ice cream ingredients, such as milk solids and sugar. Therefore, it is impossible for "precrySTALLISATION" to occur after blending with the other ice cream ingredients.

Further, as discussed previously and above, Delany does in fact disclose the criticality of the order of process steps, in which crystallization of the fat occurs after at least most of the ice cream ingredients are combined. Therefore, the only teaching of "precrySTALLISING" an edible fat for use in a frozen food product occurs in the present application.

The Examiner alleges, at page 17 of the Examiner's Answer, that "[a]lthough Delany teaches that the steps of aging and homogenization are critical, Delany teaches the function of the steps is where the criticality lie [sic] and as Brooker teaches of different steps which perform the same function, the criticality of the process as taught by Delany is maintained in the combination of Delany in view of Brooker". This is mere conjecture on the part of the Examiner, as the Examiner provides no support for the proposition that "Delany teaches the function of the steps is where the criticality lie[s]". Appellants' previous arguments at pages 11-12 of Appellants' Brief clearly indicate that the process steps of Delany are critical to the unique product produced by the process of Delany. In other words, it is clear from Delany and Appellants' previous arguments that the steps themselves are critical; to wit: "the selection and

processing [steps of homogenization and aging] . . . are critical elements in achieving the unique stability of this invention” (Delany, page 7, lines 15-19, emphasis added). This is supported by the following language from Delany: “The relatively narrow distribution of small fat crystals produced as a result of the homogenization and aging steps of the invention is substantially retained after the freezing and aeration step and this in turn is believed to contribute to this low incidence of de-emulsified fat.” (Delany, page 12, lines 9-14.) Upon reading these passages of Delany, one having ordinary skill in the art would not be motivated to eliminate the critical steps of Delany under any circumstances.

In response to Appellants’ argument that Brooker does not disclose that “precrySTALLISED” fat can be used in frozen food products, the Examiner alleges, on page 18 of the Examiner’s Answer, that “(1) Delany clearly establishes that crystallized particles of fat are desirable in frozen confections, specifically ice cream; and (2) Brooker teaches the use of improved crystallized particles of fat for improved food products; and Brooker does not limit the use of the fat to specific foods.”

While it may be true that Delany establishes that crystallized particles of fat are desirable, it also establishes that the processing steps of homogenization and aging are required to produce the “unique” product of Delany. These critical processing steps eliminate the possibility of using “precrySTALLISED” fat, as that term is described and defined in the present application. Brooker’s alleged teaching of precrySTALLIZED particles of fat being used in food products does nothing to alleviate the critical elements of Delany, especially when considering that Brooker does not teach utilizing precrySTALLIZED fats in frozen food products. Moreover, Brooker simply does not disclose or suggest using precrySTALLIZED fat in an ice cream manufacturing process. Appellants’ respectfully submit that the Examiner’s argument does not adequately refute Appellants’ previous argument.

#### **B. Claims 34-36 and 38**

No new arguments have been presented by the Examiner with regard to the rejections of claims 34-36 and 38. Appellants’ Brief adequately refutes the final rejection of claims 34-36 and 38.

### C. Claim 41

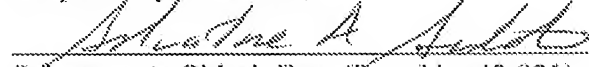
The Examiner has set forth a new argument with regard to the § 112 rejection of claim 41. However, such argument does not refute Appellants' previous arguments. That is, claim 41 recites the feature "wherein the dispersion is provided at below ambient temperature for gasification and freezing." The term "ambient temperature" is a widely known and accepted scientific term that refers to "the temperature of the environment or surroundings in which an experiment is conducted or in which physical or chemical events occur." Thus, it is clear that the "ambient temperature" recited in claim 41 refers to the temperature of the ice cream making process just prior to or during gasification and freezing and, it is respectfully submitted, one of ordinary skill in the art of ice cream manufacturing would be reasonably apprised of the scope of the claim.

### Conclusion

Appellants submit that the remarks presented in Appellants' Brief under 37 C.F.R. § 41.37, as well as the remarks presented hereinabove, address and rebut all existing rejections concerning the 35 U.S.C. §§ 112 and 103 rejections of claims 23-39 and 41. Appellants respectfully request that the Board reverse the final rejections under 35 U.S.C. §§ 112 and 103 and require the Examiner to issue a notice of allowability directed to claims 23-39 and 41.

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